* **HIGH COURT OF DELHI : NEW DELHI**

+ **OMP No.25/2003**

Judgment reserved on: April 03, 2007

% **Judgment delivered on: September 05, 2007**

BWL Ltd ..... Petitioner

Through: Mr. D. K. Malhotra, Mr.Rajesh Malhotra and Mr. S. Kohli, Advocates.

versus

Mahanagar Telephone Nigam Ltd. & Anr. ..... RespondentS

Through: Mr. Ravi Sikri and Mr.Ayushya Kumar, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

1. Petitioner has preferred the present petition under Section 34 read with section 13 of the Arbitration & Conciliation Act, 1996 challenging the award dated 24.10.2002 by the Sole Arbitrator (Mr.) Justice S. Ranganathan (Retired).

BACKGROUND FACTS

2. The Respondent No. 1 had, on 25.5.1993, floated a tender, inter alia, for supply of 1672 Kms optical fiber cable with joining materials and accessories. The petitioner submitted its bid in response to the said tender. After going through the evaluation process, on 26.7.1994, a letter of intent was issued by Respondent No.1 to the petitioner indicating its intention to place an order for supply of 49 Kms of optical fibre cable and accessories upon the petitioner, subject to certain terms and conditions. The delivery of the materials had to be completed by February 28, 1995 at the latest. The Respondent No. 1 thereafter, issued a purchase order dated August 22, 1994 for supply of 49 kilometers of optical fiber cables (OFC) along with the accessories on the terms and conditions indicated therein.

3. Petitioner, however, could not commence production of OFC within time to be able to supply the same to the Respondent within the contractual period. Consequently, the petitioner repeatedly sought extension of delivery period. Extension of time was granted by the Respondent upon certain terms and conditions, which were incorporated in the various amendments to the purchase order. These have been discussed later in the course of the judgment.

4. The petitioner could manage to effect the delivery only on

26th September 1995, for which the last amendment was made to the purchase order described as amendment No.6. The Respondent also issued a letter of the same date under which the price payable for 1995-96 supplies was fixed at Rs.97,588.60 per kilometer (all inclusive). This was based on the rates fixed by the DOT in respect of OFC cable supplied during the financial year 1995-96.

5. Respondent paid to the petitioner for the supplies effected at the rates fixed by DOT for 1995-96 supplies. However, while making payments to the petitioner, the Respondent made deductions towards liquidated damages. The petitioner raised disputes about the rate at which the payment had been made by claiming that it was entitled to be paid at the rates fixed under the purchase order. i.e @ Rs.1,21,512.50 per km. The petitioner also objected to the deduction of liquidated damages. Since the Respondent repudiated these claims of the petitioner, they were referred to the sole arbitration of Mr. Justice S. Ranganathan (retired). Before the learned Arbitrator, the petitioner made the following claims:

"(1)	Excess price collected for the supplies	Rs.27,47,458
(2)	Amount unlawfully deducted by MTNL from the bills towards alleged liquidated damages	Rs. 5,47,205
(3)	Interest on the above amounts from 17.10.95 till 31.5.2000. Rs.41,38,807	

Total	Rs.74,33,470

6. The petitioner also claimed interest on the aforesaid amount @ 18% per annum from 1.6.2000 till the date of the award.

7. By his impugned award, the learned arbitrator has rejected all the claims of the petitioner and consequently this petition has been filed by the petitioner to challenge the award.

Petitioner's submissions:-

8. Learned counsel for the petitioner firstly argues that the impugned award has been rendered contrary to the contractual terms. His submission is that a perusal of the contractual terms shows that the price of optical fiber cable to be supplied by the petitioner was fixed, and the unit price was Rs.1,21,512.50 per KM. He has drawn my attention to clause 8.1 of the Purchase Order dated 22nd August 1994, which states that "*The total price of the purchase order shall be Rs.68,32,344.50"*. He also refers to Annexure `A' to the purchase order which contains the details of the Stores ordered on the Petitioner under the purchase order in question. The first item mentioned in the tabulation in Annexure `A' is *'12 Fiber Optical Cable'*. The quantity is stated to be 49 Kms. The unit price mentioned is Rs.1,21,512.50 thereby making a total price of the optical fiber cable as Rs.59,54,112.50. The total price of all the items again comes

to Rs.68,32,344.50. He also refers to clause 12 of the General Conditions of Contract which reads as follows:

> "12. PRICES:
>
> 12.1 Prices charged by the supplier for goods delivered and services performed under the contractor shall not vary from the prices quoted by the supplier in his bid.
>
> 12.2 PRICES FOR ORDERING:
>
> The prices fixed by MTNL shall remain valid for the period of delivery schedule stipulated under the 'Schedule of Requirements' by MTNL. Increase and decrease of taxes and duties will not affect the price during the originally offered delivery schedule.
>
> 12.3 For any add-on order, price will be fixed after adjusting the price according to the taxes and duties as on date of such order."

9. He submits that under the General Purchase Conditions, the bidders, like the Petitioner, were required to quote firm prices, item wise (clause 3.2). The bidders were also required to confirm that their *"quoted prices shall remain, in the event of an order, Firm and Fixed and subject to no variation of any description during operation of the order"* (clause 3.3 of the General Purchase Conditions). All these clauses, according to the Petitioner, clearly show that the contract was a fixed price contract for all supplies to be made thereunder and the Respondent could not reduce the prices unilaterally to the detriment of the Petitioner.

10. Learned counsel for the petitioner, while dealing with

clause 5 of the General Purchase Conditions, which gives to MTNL "*the right to modify or amend this order subject to an adjustment in the price and/or delivery date in accordance with the applicable provision of the order, if any, or pursuant to mutual agreement*", argued by reference to clause 13 of the General Conditions of Contract, (which in effect authorises the purchaser, i.e., MTNL to change specifications, method of transportation and packing, place of delivery and services to be provided by the supplier), that the right of modification given in clause 5 of the General Purchaser Condition is to be read in the light of the right given to the purchaser to amend the specifications etc. He submits that only if there is a change in specifications etc., the firm prices could be changed "*in accordance with the applicable provision of the order, if any, or pursuant to mutual agreement".* However, according to the Petitioner, there was no change in the specifications or any other relevant terms or condition for supply of cable and, consequently, clause 5 of the General Purchase Condition could not be resorted to by the Respondent to reduce the price of the cable supplied by the Petitioner. Learned counsel for the petitioner submits that while dealing with the aspect of liquidated damages, the learned Arbitrator has failed to consider clause 16.2 of the General Conditions of Contract and failed to determine whether the liquidated damages ought to have been 0.5% of the value of the delayed supply, for each

week of delay or part thereof, subject to the maximum of 10% of the value of the delayed supply, or the same should have been levied at the aforesaid rate on the total value of the contract.

11. Counsel for the petitioner submits that the respondent could not have simultaneously imposed liquidated damages and varied the price to the detriment of the petitioner. Learned counsel submits that the award in question is contrary to sections 73 and 74 of the Contract Act. Under Section 73, "*when a contract is broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any losses or damages caused to him thereby, which inter-alia, arose in the usual course of things from such breach or which the party knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given to any remedy or indirect loss sustained by reason of the breach".* Under Section 74, "*'when a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complainant of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party, who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for".*

12. On the basis of aforesaid two provisions, it is argued that the Respondent, in any event, ought to have proved that it had suffered some damages on account of the failure of the Petitioner to make the supplies within the contractual period. That not having been done by the Respondent, there was no question of levy of any liquidated damages upon the Petitioner. Consequently, the finding of the learned Arbitrator whereby he upholds the liquidated damages deducted by the Respondent from the amounts due to the Petitioner cannot be sustained.

13. Learned counsel for the petitioner also sought to rely on ***M/s. Sikkim Subba Associates vs. State of Sikkim***, JT 2001 (5) SC 186 and particular paragraph 14 thereof, wherein the Hon'ble Supreme Court observed that "*it is also, by now, well settled that an Arbitrator is not a conciliator and his duty is to decide the dispute submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable*".

14. Reliance has also been placed on the decision of the Hon'ble Supreme Court in ***Rajasthan States Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises & another***, (1999) 9 SCC 283. In this judgment, the Hon'ble Supreme Court had observed that '*it is settled law that the Arbitrator is the creator of the contract between the parties and hence if he ignores the specific terms of the*

contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered.' He also refers to ***Chiranji Lal Sri Lal Goenka (Dead) by LRs vs. Jasjit Singh and others***, (2001) 1 SCC 486. In this case, rejecting the argument that where two views are possible and that since the Arbitrator has taken a plausible view, the award cannot be interfered with, the Hon'ble Supreme Court held that the award on the face of it was illegal and erroneous.

15. The Petitioner also relies on ***K.P. Poulose vs. State of Kerala,*** AIR 1975 SC 1259. In this judgment the Hon'ble Supreme Court held that misconduct under Section 30(a) of the Arbitration Act, 1940 comprises legal misconduct which is complete if after the Arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own findings, or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

16. It is argued that the question is not whether the petitioner has accepted the variation in the price by effecting supplies. It is whether the respondent MTNL could have, in the first place, imposed such a condition. By referring to the last two lines of paragraph 11 of the award, counsel for the petitioner submits that the reduction in the rates was unilateral on the part of the MTNL and merely because the

petitioner had acted upon the same, it could not be said that the petitioner had waived the breach of the agreement by the MTNL in reducing the price unilaterally, or that the petitioner had accepted the said deduction once and for all.

17. Counsel for the petitioner also relied on Section 55 of the Contract Act to submit that from a reading of the contract, it is clear that time was not of the essence of the contract, and, consequently the contract did not become voidable upon the failure of the petitioner to make the supplies within the specified time. In the facts and circumstances of the case, all that the MTNL was entitled to, was compensation for any loss occasioned by the failure of the petitioner to effect supplies within the stipulated time. He also relied on a decision of this Court in ***Titanium Tantalum Products Ltd v. Shriram Alkali & Chemicals***, (2006)(2) Arbitration Law Reports 366 (Delhi).

18. He further submits that the Award passed by learned Arbitrator is against the Public Policy of India. The award according to the learned counsel for the petitioner, is not only in contravention of the contractual term but also the law of the land. He relies on the decision of the Supreme Court in ***ONGC vs. Saw Pipes Ltd.,*** JT 2003 (4) SC 171 and particularly para 31 thereof, which states that an award which is, on the face of it, patently in violation of the statutory

provision cannot be said to be in public interest. Such an award is likely to adversely affect the administration of justice. The expression 'public policy' is required to be given a wider meaning and an award could be set aside if it is patently illegal. He submits that “an Award could be set aside 'if it is contrary to:-

(a)Fundamental policy of Indian law; or

(b)The interest of India; or

(c) Justice or morality, or

(d) In addition, if it is patently illegal.

19. In **Saw Pipes** (supra), the Supreme Court explains what is meant by a patent illegality by observing:-

> “IIlegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

Respondent's submissions:-

20. On the other hand, learned counsel for the respondent has defended the award in question by arguing that the said award is well reasoned and has been passed after taking into consideration the documents and submissions of the parties. The learned Arbitrator has interpreted the contract in a reasonable manner by appreciating the true intent of the parties as reflected in the terms of the contract. It

is also argued that the objections raised by the petitioner are entirely on the merits of the case and beyond the scope of interference under Section 34 of the Act. He contends that this Court is not sitting in appeal over the award in question. Learned counsel for the respondent relies on ***Bharat Heavy Electricals Ltd. vs. Global Hi Fabs Ltd.***, 116(2005) DLT 1 (paragraphs 13 to 19) which states that if an Arbitrator has interpreted a clause in the contract in a particular manner and has taken a decision which is a plausible view, it is not permissible for the Court to substitute its own evaluation or conclusion of law or fact. By relying on ***Union of India Vs. Arctic India***, 125(2005) DLT 478, he submits that the Court while examining an award of an Arbitrator will not substitute its opinion with that of the Arbitrator. Even if the facts and circumstances of the case are open to two plausible interpretations, it is legitimate for the Arbitrator to accept one or the other available interpretation and even if the Court may think that the other view is preferable, the Court will not and should not interfere with the interpretation of the Arbitrator unless and until the decision of the Arbitrator is manifestly perverse or has been arrived on the basis of wrong application of law. He further submits that the scope of interference by the Court under the 1996 Act is narrower than the scope of interference by a Court in an arbitral award governed by the 1940 Act. For this proposition, he relies on a decision of this Court in ***Housing and Urban***

Development Corporation Limited vs. Leela Hotels Ltd., FAO(OS) 59/2003 decided on 9.11.2004. In this judgment the Hon'ble Division Bench relying on the earlier decisions of the Supreme Court held that if the Arbitrator has interpreted a clause in an agreement in a particular way and has taken a decision which is a plausible view, it is not permissible for the Court to substitute its own evaluation or the conclusion of law or fact. If the clauses in the contract are open to two plausible interpretations, it is legitimate for the Arbitrator to accept one or the other available interpretation and even if the Court may think that if the other view is preferable, the Court will and should not interfere with the interpretation of the Arbitrator. To support the contention that the objections to an award under Section 34 of the Act are not to be treated as an appeal from the award, learned counsel for the respondent relies on ***DGS and D Vs. Eupharma Laboratories Limited*** in OMP No.287/1999 decided on 9.3.2006. By relying on ***DDA vs. Emkay Construction Company*** in OMP No.54/06 decided on 17.2.2006, counsel for the respondent contends that it is not within the scope of scrutiny by the Court of an arbitral award to reappraise the evidence or interfere with it merely because the Court would come to a different conclusion on the same set of facts. He submits that, no doubt, the arbitral award could be set aside if it is patently illegal. Resultantly it could be set aside if it is contrary to:-

(a) Fundamental policy of Indian laws; or

(b) The interest of India; or

(c) Justice or morality; or

(d) If it is patently illegal.

21. However, the illegality must go to the root of the matter and if illegality was of a trivial nature, it cannot be held that the award is against the public policy. The award could be set aside if it is so unfair or unreasonable that it shakes the conscience of the Court. Such an award is opposed to public policy and is required to be adjudged void. In support of the aforesaid proposition he also relies on ***Arosan Enterprises Ltd Vs. UOI***, (1999) 9 SCC 449; ***Raipur Development Authority v Chokhamal Contractors***, AIR 1990 SC 1426 and various other decisions of this Court and the Hon'ble Supreme Court.

22. Learned counsel for the respondent further submitted that the imposition of liquidated damages was challenged by the petitioner before the learned Arbitrator on the ground that such imposition was not justified. However, the petitioner did not dispute the quantification thereof. He refers to paragraph 18 of the statement of claims before the learned Arbitrator. The imposition of liquidated damages was challenged on the ground that the delay in supply of the goods was not due to any factors within the control of the claimant,

but was on account of *force majeure* conditions. The challenge was also on the ground that the respondent, in fact, did not suffer any loss due to the delay in supply of the goods by the claimant. It was also claimed that clause 15 contained in Section 3(General Conditions of Contract) is a nullity. However, the claimant did not seek to challenge the actual quantification of the liquidated damages. Learned counsel also argued that while seeking extension of time for effecting supplies of the goods in question, the petitioner did not plead *force majeure* conditions. He also refers to the award of the learned Arbitrator wherein the Arbitrator has extensively dealt with the submission of the petitioner based on *force majeure* and argues that these findings of fact cannot be interfered with by the Court in these proceedings since they are final and binding on the parties.

Discussion & Decision:-

23. The first question that arises for consideration is, whether the impugned award discloses a patent error in the interpretations of the contractual terms with regard to the price of the goods payable to the petitioner. The letter of intent issued by the respondent indicated the rate of OFC at Rs.1,21,512.50 per km. The delivery of goods had to be completed latest by 28-2-1995 and it also contained a condition that *"the above indicated rates or the rates finalised by the Department of Telecommunications (DOT) for 1994-95 supplies,*

whichever are lower, shall finally be applicable for settlement of payments against LOI". The petitioner accepted the terms of the LOI by its letter dated 2.8.1994. On 28.8.1994 the respondent MTNL placed a purchase order on the petitioner for purchase of, inter alia, 49 kms length of Optical 12F Cables on the terms and conditions set out in Annexure A to the order. The special condition of the LOI aforesaid was reiterated in clause 8.2 of the purchase order. Under the purchase order as well, the supplies had to be completed by 28.2.1995. Clause 6.2 of the General Conditions of Contract annexed to the purchase order stipulated that *" the delivery of the equipment shall commence as specified and be completed within the time schedule specified in schedule of requirements and this shall be the essence of the contract."* Clause 12.2 stated that *"the price fixed by MTNL shall remain valid for the period of delivery stipulated under the schedule of requirements by MTNL."*

24. Admittedly, the petitioner was unable to deliver the goods within the stipulated period. To the request of the petitioner for extension of delivery period made on 22.10.1994, the MTNL vide letter dated 10.11.1994 agreed to late submission of the prototype for approval. However it insisted for the delivery of the entire supply by 28.2.1995. Petitioner successively sought extension of time for delivery from time to time and upto 15.9.1995. These extensions were granted by the respondent vide memoranda dated 24.4.1995,

29.9.1995, 6.7.1995 and 16.8.1995 respectively contained in amendment nos. 2,3 4 and 5 to the purchase order dated 28.8.1994. The first extension of delivery period upto 31.3.1995 amended the purchase order in respect of the price. The relevant extract of this amendment is as follows:-

> "Sub-clause 8.2 and Special Condition Clause at Annexure `A'
>
> The rates indicated in the abovesaid purchase order are firm subject to the condition that the supplies have been delivered as per the scheduled delivery period before 31.03.95 and, therefore, the special condition clause indicated in this purchase order shall stand deleted.....**.**Further, for the supplies not completed upto 31.03.95, the delivery period extension with liquidated damages on the revised prices to be finalized for 95-96 supplies shall be applicable for which the separate amendment shall be issued for such cases after verifying the requirement.

25. Vide Memoranda dated 29.5.1995, the delivery period was extended upto 31.7.1995. The respondent, apart from levying liquidated damages, for failure to supply the cables upto 31.3.1995 in respect of applicable prices, stated as follows:-

> "1. Applicable provisional prices for supplies effected from 1.4.1995 onwards shall be as follows:-
>
> | ITEM | NEW REVISED UNIT (PROVISIONAL) PRICE (ALL INCLUSIVE) (IN RS.) |
> |---|---|
> | i) 12 Fibre Optical Cable | Rs.97,588.80 Rupees Ninety Seven Thousand Five hundred Eight Eight and paisa Eighty PKM only |

26. A similar pattern was followed in respect of subsequent

amendments as well.

27. The petitioner effected deliveries only on 26.9.1995. The respondent also communicated the final rate for the supplies effected during 1995-96 at Rs.97,588.80/- per km (all inclusive) since that was the rate fixed by the DOT in respect of supplies effected during the financial year 1995-96.

28. The learned Arbitrator rejected the petitioner's submission that the prices under the contract were fixed and firm and that the MTNL had no right to vary the prices stipulated in the Purchase Order by giving his reasons. He interprets the contractual clauses, including clause 5.1 (relied upon by the petitioner) to mean that MTNL could always effect an adjustment of the price and /or delivery date, *"in accordance with the applicable provision of the order"*. The Purchase Order itself envisages the completion of the delivery of the goods by 28.2.1995, and the rates will be those stated in the Purchase Order, or those which are finalised by the DOT for the 1994-95 supplies. For deliveries not effected by that date, the rates were not fixed. Therefore, when the delivery of the goods got postponed to a date after 28.2.1995, and well into the financial year 1995-96, the MTNL prescribed the rates, which were lower of the two i.e the rate stated in the Purchase Order and the rates fixed by the D.O.T for supplies in the year 1995-96. This, the learned Arbitrator holds is in tune with the terms of the purchase order, and valid. He

further holds that, in truth, there is no variation in the purchase price at all. The contract always envisaged that the price payable will be that fixed in the purchase order or that fixed by the DOT for supplies during the financial year in which the delivery is effected, whichever is lower.

29. This interpretation given by the learned Arbitrator to the contractual terms is not only a plausible interpretation, and therefore, cannot be faulted with, but also appears to be the only reasonable way to interpret the contract. There is nothing to suggest that this interpretation can be called as perverse, or that the same has been arrived at in ignorance of the contractual terms or is glaringly at variance with any of the contractual terms. It is only reasonable to interpret the question of applicable rate in the manner decided by the learned Arbitrator, since a party cannot seek to derive an undue advantage by its own default, of being paid a higher rate for supplies effected well beyond the contractual date, when the prices of the said goods are generally falling with each passing year.

30. The learned Arbitrator has viewed the said reduction in prices from another angle. He holds that the amendments of the purchase orders to extend the delivery dates upon conditions contained therein, with regard to the prices, tantamounted to a mutual revision of the purchase order within the meaning of clause

5.1 of the General Conditions of the Contract. He holds that though the said clauses were unilaterally prescribed by the MTNL in the first instance, they were acted upon and hence agreed to by the petitioner by its conduct. The petitioner could not, therefore, now turn around to assail the revision of the contractual terms. This is also, to my mind a reasonable and plausible view and therefore, does not call for interference. Pertinently, even the learned Arbitrator does not consider the stipulation as to time of delivery to be of the essence of the contract. The submission of the petitioner founded upon Section 55 of the Contract Act, therefore, looses force.

31. It is always open to the parties to mutually vary the contractual terms. In case one of the parties to an existing contract proposes a variation of the contractual terms, and the other party accepts the suggested variation either expressly or by implication evident from its conduct, the second party cannot, subsequently, complain about the variation in the contractual terms. The learned Arbitrator has, in the alternative, read a mutual variation of the contract from the conduct of the parties. In my view, there is nothing wrong with it.

32. Coming to the contentions of the petitioner that the MTNL – a public undertaking had imposed arbitrary and unreasonable terms by stipulating alternative prices, I find that the learned Arbitrator has

exhaustively dealt with the same in para 12 of the impugned award. The learned Arbitrator holds that there is nothing in the Sale of Goods Act to prohibit a purchaser from specifying a fixed price or a price that may be determined, by reference to, say, the prices prevailing in the market for similar goods on the date of delivery, whichever is lower. Clause 8.2 of the General Conditions of Contract in the Purchase Order does just that. The learned Arbitrator rejected the petitioner's submission that the stipulation of alternative prices in the contract thereby making the price liable to revision, as being illegal or incidental. The learned Arbitrator held that under the scheme formulated in the NIT and the purchase order, the bidders were required to quote, firm and fixed prices and not to deviate therefrom once an order is placed on them. The NIT did not specify the price which MTNL would eventually pay, since the same would depend on the terms of the purchase order. The NIT specifically authorised the respondent MTNL to make price adjustment in the course of implementation of a purchase order. This variation was based on a reasonable criteria, i.e the prices fixed by DOT for the financial year in which the supplies are made of similar goods. He further holds that while the bidders were bound to quote, fixed and firm prices and not to deviate therefrom, once an order was placed on them, the NIT permitted MTNL to quote its prices while placing an order, with a right of variation during the implementation of the order so as to

entitle it to pay either the prices fixed in the purchase order, or the DOT prices prevalent in respect of the supplies made during the financial year in which the deliveries are effected.

33. In my view the aforesaid interpretation given by the learned Arbitrator, which is also based on an understanding of the factual background in which the tenders for the goods in question were invited and operated, cannot be faulted and appears to be a reasonable view considering that the NIT after being issued in the year 1994 was again issued by MTNL only in the year 1997. The MTNL had consistently prescribed and practiced the formula of paying the suppliers the prices prevalent under the DOT contracts at the time when the supplies were effected. The learned Arbitrator held that there is nothing arbitrary or unconscionable in a PSU providing in its purchase contracts that only the standard prices fixed by a established consumer of the goods in question will be paid by it as well. To hold otherwise will result in public funds being utilised to make purchases of goods at prices much in excess of their contemporary market value. This is, in my view, a reasonable and a plausible view to take in the facts and circumstance so this case.

34. The learned Arbitrator deals with the petitioner's contention that it had accepted the price revision under protest, and that it had also objected to the levy of liquidated damages by relying

upon the communication dated 9.6.1995 of the petitioner which only sought waiver of liquidated damages. The communications set up by the petitioner, whereby, the petitioner purportedly accepted the purchase order under protest and without prejudice to their rights to question the reduction in prices and imposition of liquidated damages were not accepted by the learned Arbitrator. Receipt of these communications had been denied by the respondent.

35. The learned Arbitrator finds that the purchase order dated 28.8.1995 itself authorised price variation. In case the petitioner was not agreeable to supply the goods on the reduced prices, it had the option not to supply the goods. However, having supplied the goods and availed of the amendments to their advantage, they could not later on seek to challenge the same to claim the higher price under the contract.

36. In my view, the learned Arbitrator was the sole judge of the facts and there is nothing apparently wrong with the conclusions drawn by him even on this aspect of the matter.

37. Coming to the aspect of imposition of liquidated damages, the petitioner had sought to invoke the force majeure clause to say that the delay was on account of heavy snow and rain in the Himalayan region at the relevant time. However the learned Arbitrator did not accept this submission by relying on clause 17.1,

which required the petitioner to give notice of the occurrence of force majeure conditions within 21 days. In my view, whether or not force majeure conditions prevailed and could be taken into account is again an issue of fact and the finding of the learned Arbitrator cannot be interfered with in these proceedings.

38. The learned Arbitrator, I find, has discussed in detail the case of *force majeure* set up by the petitioner and rejected the same by giving his reasons. He has relied on the communications sent by the petitioner itself on 22.10.1994, 22.3.1995, 15.5.1995 and in none of these letters, while seeking extension of the delivery period, the petitioner made out any case of *force majeure* conditions prevailing at the relevant time. The learned Arbitrator has held that adverse weather conditions was introduced, as a cause for delay in effecting the supplies, as an afterthought. The letters of the petitioner unmistakably show that it had other problems which led to seeking extension of time repeatedly, but bad weather conditions were not one of them. There are findings of fact and there is nothing brought to the attention of the Court to assail the same.

39. I may note that the respondent had imposed liquidated damages of Rs.5,47,205/- on the basis that there was a delay of 25 weeks between 1.4.95 and 15.9.95, but at the maximum rate of 10% of the total purchases, since the delay was in the delivery of the entire

quantity supplied. Counsel for the petitioner could not point out anything from the arbitral record to show that any such argument had ever been raised before the learned Arbitrator. In this view of the matter, the petitioner is precluded from raising any such argument at this stage. I find no ground to interfere with these findings of the learned Arbitrator, which appear to be totally fair and reasonable. In the case of ***Titanium Tantalum Products Ltd*** (supra) relied upon by the petitioner, the equipments supplied by the petitioner were found to be defective. The respondent was held liable to refund the cost paid to the petitioner. The claim of the respondent for losses suffered as a consequence of non-supply of the equipment as per specifications was also allowed. The Court held that the petitioner did not know the extent of damages that the respondent would suffer on account of the failure to supply the equipment as per the agreement and consequently reduced the damages to 5% of the contractual value. This decision only dealt with the aspect of quantification of damages and has no application in the facts of the present case. The petitioner contended that what had been claimed as liquidated damages, were in fact in the nature of penalty, since the MTNL suffered no prejudice or handicap because of the delay in supply of the goods. This argument was rejected by the learned Arbitrator. In doing so, he relied upon the affidavit by way of evidence filed on behalf of the respondent wherein the respondent had stated that it

had suffered heavy losses due to non-supply of cable due to which the commissioning target of the respondent got affected for release of new connections and since new connections could not be given or installed, the respondent suffered loss of revenue. The witness also confirmed that the cable ordered from the claimant was for specific projects which were delayed. The cable was needed for junctions working and commissioning of remote lying units which are revenue gathering. The learned Arbitrator held that it could not be said that the damages suffered by MTNL due to delay in supply by the petitioner was illusory, and that the respondent should have substantiated its claims for damages by actual proof of loss of revenue suffered.

40. In my view, the learned Arbitrator is the final judge of the facts before him. The strict Rules of evidence do not bind him. His findings of fact cannot be interfered with since it cannot be said that they are wholly inconsistent with the facts of the case. Moreover, it is only reasonable to assume that due to the delay in the supply of the OF cable, the implementation of the projects of MTNL was delayed, which in turn, caused some loss of revenue to the respondent. The parties had agreed to the levy of liquidated damages as a genuine predetermined estimate of loss caused due to failure to supply the cable by the petitioner, and the same cannot be said to be an imposition by way of penalty. The learned Arbitrator, in my view,

has correctly appreciated that the contract in this case safeguarded the respondent MTNL against two situations, viz., the possibility of delivery dates being dragged beyond the financial year in which they were agreed to be supplied, and, the loss of revenue or loss in the implementation of projects caused by delay in supply of goods. The first was safeguarded by providing a variable price formula, and the second by imposition of liquidated damages.

41. Consequently, there is no force in the submissions of the petitioner that the respondent could not have, at the same time subjected the petitioner to liquidated damages and to price reduction. The argument based on Sections 73 and 74 of the Contract Act, in view of the aforesaid discussion is also of no avail to the petitioner.

42. For the aforesaid reasons, I dismiss the objections with costs quantified at Rs.10,000/-.

(VIPIN SANGHI)
JUDGE

September 05, 2007
as/P.K.BABBAR